UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ANWAR ALKHATIB,
Plaintiff,

-against- **Case No. 13-CV-2337 (ARR) (SMG)**

NEW YORK MOTOR GROUP LLC,
PLANET MOTOR CARS, INC.,
MAMDOH ELTOUBY, AND
NADA SMITH
Defendants.

SHAHADAT TUHIN
Plaintiff,

-against- **Case No. 13-CV-5643 (ARR) (SMG)**

NEW YORK MOTOR GROUP LLC,
PLANET MOTOR CARS, INC.,
MAMDOH ELTOUBY, AND
NADA SMITH
Defendants.

SIMON GABRYS,
Plaintiff,

-against- **Case No. 13-CV-7290 (ARR) (SMG)**

NEW YORK MOTOR GROUP LLC,
PLANET MOTOR CARS, INC.,
MAMDOH ELTOUBY, AND
NADA SMITH
Defendants.

BORIS FREIRE, et al,
Plaintiffs,

-against- **Case No. 13-CV-7291 (ARR) (SMG)**

NEW YORK MOTOR GROUP LLC,
PLANET MOTOR CARS, INC.,
MAMDOH ELTOUBY, AND
NADA SMITH
Defendants.

ZHENG HUI DONG,
Plaintiff,

-against-

Case No. 14-CV-2980 (ARR) (SMG)

NEW YORK MOTOR GROUP LLC,
PLANET MOTOR CARS, INC.,
MAMDOH ELTOUBY, AND
NADA SMITH
Defendants.

NASRIN CHOWDHURY,
Plaintiff,

-against-

Case No. 14-CV-2981 (ARR) (SMG)

NEW YORK MOTOR GROUP LLC,
PLANET MOTOR CARS, INC.,
MAMDOH ELTOUBY, AND
NADA SMITH
Defendants,

TAREQUE AHMED
Plaintiff,

-against-

Case No. 15-CV-0284 (ARR) (SMG)

NEW YORK MOTOR GROUP LLC,
PLANET MOTOR CARS, INC.,
MAMDOH ELTOUBY, AND
NADA SMITH
Defendants.

YSABEL BANON,
Plaintiff,

-against-

Case No. 15-CV-4691 (ARR) (SMG)

NEW YORK MOTOR GROUP LLC,
PLANET MOTOR CARS, INC.,
MAMDOH ELTOUBY, AND
NADA SMITH
Defendants.

CHEA SUNG PARK,
Plaintiff,

-against-

Case No. 15-CV-5374 (ARR) (SMG)

NEW YORK MOTOR GROUP LLC,
PLANET MOTOR CARS, INC.,
MAMDOH ELTOUBY, AND
NADA SMITH
Defendants.

PLAINTIFFS' MOTION IN LIMINE FOR SPOLIATION SANCTIONS

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PRELIMINARY STATEMENT

Plaintiffs jointly file this motion *in limine* for spoliation sanctions against Defendants New York Motor Group LLC ("NYMG"), Planet Motor Cars Inc., Mamdoh Eltouby, and Nada Smith (collectively, "Defendants) based on their deliberate failure to preserve critical evidence—the hard drive containing audio and visual recordings of interactions with Plaintiffs. Plaintiffs have consistently requested all recordings of their transactions, since before filing lawsuits – recordings that Defendants concede were created and maintained on their premises. Yet, months after Plaintiffs' specific requests, Defendants deliberately (and inexplicably) abandoned the critical hard drive with recordings of their employees' interactions with customers in clear violation of the federal rules. This, at best, grossly negligent failure to preserve critical evidence merits an extreme spoliation sanction. Plaintiffs respectfully move that the Court, at a minimum, impose a mandatory adverse inference instruction and monetary sanctions.

BACKGROUND

I. Defendants' Notice of the Claims

Defendants were on notice of Julio Estrada's fraudulent practices by the first half of 2013, when they began receiving customer complaints. ((Aff. of Ariana Lindermayer in Supp. of Mot. in Limine ("Lindermayer Aff."), Ex. A ("Smith Depo"), 157:5-158:4.) The first of these consolidated cases, *Alkhatib v. NYMG*, et al., No. 13-CV-2337, was filed on April 18, 2013. By then, Plaintiff Tareque Ahmed had already complained directly to NYMG's de facto manager, Mrs. Smith, that he had been defrauded. (*Ahmed*, Dkt. No. 10, ¶ 9.) Plaintiffs Shahadat Tuhin, Boris Freire, Simon Gabrys, Nasrin Chowdhury (through her son Shehad Kazi), and Ysabel Banon soon followed, each telling Mrs. Smith they had been defrauded, respectively, on June 24, 2013, in July 2013, in October 2013, also in October 2013, and by November 2013. (*Tuhin*, Dkt. No. 1, ¶ 36; *Freire*, Dkt. No. 1, ¶¶ 76, 79; *Gabrys*, Dkt. No. 1, ¶¶ 107-108; *Chowdhury*, Dkt. No. 5, ¶ 36; *Banon*, Dkt. No. 17, ¶¶ 132, 139, 150; Lindermayer Aff., Ex. B ("Banon Depo"), 50:11-15.) Mrs. Smith heard their and others' complaints, (Smith Depo, 75:10-76:3; 78:7-13; 143:5-12; 195:22-25; 196:7-11; 210:9-211:4; 215:24-216:3; 221:22-222:5), and reported them to her father, NYMG's owner Mr. Eltouby (Smith Depo, 76:4-9; 256:19). Mr. Eltouby knew that there were "tremendous" complaints. (Lindermayer Aff., Ex. C ("Eltouby Depo"), 112:2-113:9; 433:17-25.)

In July and August 2013, consumers held two protests at NYMG regarding its fraudulent practices. The police were called to the dealership both times and, at the second, discussed specific complaints with Mr. Eltouby and Mrs. Smith. (Smith Depo, 193:17-194:20; Eltouby Depo, 607:24-605:2.) Those complaints were not resolved. By fall, police were being called to the dealership at least every other week. (Smith Depo, 78:14-79:9; Eltouby Depo, 553:23-554:9.)

In September 2013, counsel for Mr. Tuhin sent demand letters to Mr. Eltouby seeking relief for fraud. (Lindermayer Aff., Exs. D & E.) That month, Mr. Ahmed filed a *pro se* lawsuit against NYMG in state court and obtained a default judgment. By October 11, 2013, the second of the consolidated cases, *Tuhin v. NYMG*, et al., No. 13-CV-2337, was filed. On December 23, 2013, Mr. Gabrys and Mr. Freire filed lawsuits. Mr. Eltouby did not bother to renew NYMG's license with the NYC Department of Consumer Affairs because he first would have had to resolve all the outstanding complaints. (Eltouby Depo, 126:16-127:22.) He claims the dealership ceased operations shortly thereafter, in January 2014. (Eltouby Depo, 126:12-15.) A few months later, Mr. Estrada was arrested for scheming to defraud consumers. (Lindermayer Aff., Ex. F.)

II. Defendants' Failure to Preserve Critical Evidence

Plaintiffs learned of NYMG's surveillance system because Mr. Estrada pointed out the cameras to reassure them that what he said was recorded and monitored by the lenders, and therefore could be trusted. (*Tuhin*, Dkt. No. 1, ¶ 21; Lindermayer Aff., Ex. G ("Tuhin Depo"), 86:16-20; Banon Depo, 10:21-11:4; Lindermayer Aff., Ex. H ("Estrada Depo"), 63:10-20.)

On September 12, 2013, counsel for Mr. Tuhin demanded all evidence, and specifically "recordings the dealership claims were being made of all of the transactions," be preserved and produced within seven days. In addition, after Mr. Eltouby stated that he had recordings of all interactions, counsel reiterated the demand to produce them. (Lindermayer Aff., at Exs. E & F.)

On December 3, 2013, after filing suit, counsel in *Tuhin* circulated language formalizing the parties' Rule 26(f) agreement to preserve all electronic and other documents, and specifically inquiring about audio and video recordings. (Lindermayer Aff., at Ex. I.) The Court ordered a litigation hold on February 28, 2014. Counsel persisted in requesting the recordings. On March 13, 2014, previous defense counsel stated that NYMG had no recording of the transaction with Mr. Tuhin, but was making a further search of its records. (Lindermayer Aff., at Ex. J.)

After these cases were designated as related, Plaintiffs' first Request for Production of Documents, served on July 3, 2014, broadly demanded all recordings of communications with Plaintiffs. (Lindermayer Aff., Ex. K, No. 5.). After several more follow ups, Defendants stated that "There weren't any audio /visual recordings or other documents preserved regarding plaintiff's purchase." (Lindermayer Aff., Ex. L, p.2.)

Defendants confirmed the existence of a hard drive containing recordings. Mrs. Smith testified that cameras recorded everything that occurred at the dealership throughout her employment there, that there was a camera inside Mr. Estrada's office, and that audio and video were captured. She also testified that a monitor in her office streamed the video. (Smith Depo, 198:16-199:15; 203:7-9.) Mr. Estrada testified that Mr. Eltouby recorded every customer interaction, saving them on a hard drive in Mrs. Smith's office. (Estrada Depo, at 64:24-69:16.)

He also testified that Mr. Eltouby watched him closing deals by live stream to his phone, to make sure he did not steal money from the business. (Estrada Depo, at 71:19-74:4; 211:3-212:2.)

Plaintiffs repeatedly followed up, inquiring as to "why this recording was not made or preserved" and "when it was destroyed, if applicable," and seeking "the name and contact information of any individuals hired to manage this system (the 'tech guy' about whom Nada testified.)" (Lindermayer Aff., Ex. M.) Plaintiffs requested this information before Mr. Eltouby's deposition, but received no response. (Lindermayer Aff., ¶ 4.)

At his deposition, Mr. Eltouby confirmed that he recorded all interactions with customers to retain evidence of theft and fraud, and saved the recordings on two hard drives. (Eltouby Depo, 114:13-17, 120:4-120:17.) He also claimed—for the first time—that the hard drive was stolen and replaced in August 2013, (Eltouby Depo, 114:25-115:11); that the previous hard drive had no audio capacity and saved recordings for eight days; and that the replacement hard drive saved audio and video recordings and was triggered by a motion sensor. He did not know its storage capacity. (Eltouby Depo, 114:18-115:5; 120:18-23; 121:20-122:9; 124:10-24.) Mr. Eltouby did not provide any police report, insurance claim or other evidence to corroborate the theft and other claims. At his deposition, Plaintiffs also learned for the first time that—notwithstanding numerous complaints, lawsuits, and Mr. Estrada's arrest; notwithstanding that he made these recordings specifically to capture evidence of fraud; and notwithstanding that he took all other computer equipment—Mr. Eltouby left the hard drive in the trailer where NYMG was located when it closed in January 2014. (Eltouby Depo, 124:25-125:4; 134:18-135:12.)

To date, Plaintiffs have not received any hard drive or recordings from Defendants.[1] Counsel met and conferred on February 24, 2017 but were unable to reach an agreement.

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[1] Plaintiffs were unable to obtain the unpreserved evidence by other means. They received no response to a subpoena served on the dealership believed to have taken over NYMG's premises. (Lindermayer Aff., Ex. N & ¶ 5.)

ARGUMENT

Spoliation is "the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir.1999). The party seeking spoliation sanctions must establish the following three elements: "(1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a 'culpable state of mind' and (3) that the destroyed evidence was 'relevant' to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense." *Zubulake v. UBS Warburg LLC* ("*Zubulake V*"), 229 F.R.D. at 430; *Siani v. State Univ. of N.Y. at Farmingdale*, No. CV09-407 JFB WDW, 2010 WL 3170664, at *1 (E.D.N.Y. Aug. 10, 2010).[2]

I. Defendants Had an Obligation to Preserve the Hard Drive

A duty to preserve evidence arises when the party has notice that the evidence is relevant to litigation or should have known that the evidence may be relevant to future litigation. *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003)). This duty may arise even prior to the filing of a lawsuit, when the party has notice that a lawsuit is reasonably foreseeable. *Siani*, 2010 WL 3170664, at *5; *Simoes v. Target Corp.*, No. 11 CV 2032 DRH WDW, 2013 WL 2948083, at *5 (E.D.N.Y. June 14, 2013). Once the duty to preserve arises, a litigant is expected, at the very least, to suspend its routine document destruction policy and put in place a litigation hold. *Siani*, 2010 WL 3170664, at *5.

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[2] A hard drive is not electronically stored information and therefore does not trigger Federal Rule of Civil Procedure 37(e). *In re Kessler*, No. 05 CV 6056 SJFAKT, 2009 WL 2603104, at *20 (E.D.N.Y. Mar. 27, 2009). That said, Plaintiffs meet this more stringent standard. Rule 37(e) requires "that the party acted with the intent to deprive another party of the information's use in the litigation." Plaintiffs have shown intent as Defendants deliberately abandoned the evidence after specific demands that it be produced. *See Novick v. Axa Network, LLC*, No. 07-CV-7767 AKH KNF, 2014 WL 5364100, at *6 (S.D.N.Y. Oct. 22, 2014). Accordingly, under the Rule, Plaintiffs would be entitled to entry of default judgment, a mandatory adverse inference or a permissive adverse inference.

By the time NYMG claims to have ceased operations, both entities, Mr. Eltouby, and Mrs. Smith were on notice of specific claims sufficient to trigger a duty to preserve, and had knowledge of and control over the hard drive. Furthermore, counsel had made repeated express demands for the recordings and to preserve evidence. Defendants had an obligation to preserve the hard drive when they abandoned it in January 2014.

II. The Hard Drive was Abandoned with a Culpable State of Mind

The party seeking spoliation sanctions must show that the relevant evidence was destroyed with a culpable state of mind. *Toussie v. Cty. of Suffolk*, No. CV 01-6716 JSARL, 2007 WL 4565160, at *7 (E.D.N.Y. Dec. 21, 2007). In the Second Circuit, this prong can be satisfied by a showing of ordinary negligence. *Id.* The failure to implement a litigation hold at the outset of litigation amounts to gross negligence. *Id.* at *8; *S.E.C. v. CKB168 Holdings Ltd.*, No. 13-CV-5584 RRM, 2015 WL 4872553, at *9 (E.D.N.Y. Jan. 7, 2015), adopted in part, No. 13-CV-5584 RRM RLM, 2015 WL 4872555 (E.D.N.Y. Aug. 12, 2015) (imposing an adverse inference after finding the failure to take any steps to preserve relevant records to be gross negligence). When theft is claimed, the court will consider "the very convenient timing of the loss of the drive, just after defendants were put on notice of the" claim, and the "failure to pursue the alleged theft of their computer [equipment]." *Ayala v. Your Favorite Auto Repair & Diagnostic Ctr., Inc.*, No. 14CV5269ARRJO, 2016 WL 5092588, at *19 (E.D.N.Y. Sept. 19, 2016) (internal brackets omitted) (finding that this conduct is "highly suspicious," "very clearly constitutes gross negligence" and "may have even been intentional").

Here, Defendants deliberately abandoned the hard drive without attempting to preserve the information, after multiple express requests to preserve it and the filing of four lawsuits. The "inability to account for the audio recordings' disappearance, suggests nothing other than deliberate conduct and a culpable state of mind." *Novick v. Axa Network, LLC*, No. 07-CV-7767

AKH KNF, 2014 WL 5364100, at *6 (S.D.N.Y. Oct. 22, 2014). Plaintiffs have established, at a minimum, gross negligence, and "[i]n the Second Circuit even the mere negligent destruction of evidence may be sufficient to warrant sanctions." *Sekisui Am. Corp. v. Hart* , 2013 WL 2951924, at *3 (S.D.N.Y. June 10, 2013); *see also Residential Funding Corp.*, 306 F.3d at 108.

III. The Hard Drive was Relevant to Plaintiffs' Claims

Finally, Plaintiffs must show the missing hard drive contained relevant evidence that a reasonable jury could find would have been favorable to them. *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 109 (2d Cir. 2002); *Curcio v. Roosevelt Union Free Sch. Dist.*, 283 F.R.D. 102, 113 (E.D.N.Y. 2012). In this context, "relevance" means "something more than sufficiently probative to satisfy" Federal Rule of Evidence 401. *Id.* at 108–09.

Relevance may either be (1) assumed where the breaching party acted in bad faith or with gross negligence, or (2) shown with extrinsic evidence. *F.D.I.C. v. Horn*, No. CV 12-5958 DRH AKT, 2015 WL 1529824, at *13 (E.D.N.Y. Mar. 31, 2015). The extrinsic evidence need not show that the destroyed records would have been favorable to the moving party, but rather, that "at least some of [them] referenced the [] transaction between the parties that lies at the center of th[e] dispute" and "would certainly have aided [] in gaining additional information about the circumstances surrounding the" transaction. *SJS Distribution Sys., Inc. v. Sam's E., Inc.*, No. 11 CV 1229 WFK RML, 2013 WL 5596010, at *5 (E.D.N.Y. Oct. 11, 2013). "Courts should take care not to hold the movant to too strict a standard of proof regarding the likely contents of the destroyed evidence," *Residential Funding*, 306 F.3d at 108–09, because doing so "would subvert the purposes of the adverse inference, and would allow parties who have destroyed evidence to profit from that destruction." *Sovulj v. United States*, No. 98 CV 5550FBRML, 2005 WL 2290495, at *5 (E.D.N.Y. Sept. 20, 2005) (internal quotations and ellipses omitted).

Here, relevance is presumed because Defendants knowingly abandoned evidence without attempting to preserve it. Plaintiffs' counsel had made repeated direct demands for these recordings in September 2013. Yet four months later, after four lawsuits had been filed, Defendants inexplicably abandoned the hard drive on which these recordings were stored. In the face of an explicit request, a failure to preserve is deliberate or, at least, grossly negligent. *Novick*, 2014 WL 5364100, at *6 (finding that the "inability to account for the audio recordings' disappearance, suggests nothing other than deliberate conduct and a culpable state of mind"). Accordingly, Plaintiffs have established relevance without the need for extrinsic evidence.

Although not necessary, Plaintiffs have extrinsic evidence that the missing evidence referenced the transactions at the center of the dispute. There is no question that recordings of Mr. Estrada's interactions with customers, showing the content of his statements or whether he allowed them to review the documents before signing, are at the heart of liability in this case.

Moreover, recordings—of any time frame, let alone the last few months of operations—are critical to proving Mr. Eltouby's and Mrs. Smith's knowledge of and participation in the fraudulent scheme. Mr. Eltouby testified that he was not aware Mr. Estrada had defrauded his customers. Yet Mr. Estrada testified that Mr. Eltouby watched all his interactions with customers by a live stream on his cell phone—specifically to make sure Mr. Estrada was not stealing money from him. The recordings themselves would tend to show whether Mr. Eltouby was aware a massive fraud was being perpetrated.[3]

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[3] Even if the hard drive did not contain recordings of Plaintiffs' specific transactions, critical evidence showing the extent of Defendants' knowledge of and participation in the scheme doubtlessly would still have been stored. As noted, Defendants admit that every customer interaction with Mr. Estrada (and other employees) was captured on film and that they received a flood of customer complaints of fraud through the dealership's alleged closing in January 2014. Accordingly, even if the specific misrepresentations made to Plaintiffs were not captured, the hard drive referenced the transaction at the center of the dispute and would certainly have aided in gaining additional information about the circumstances surrounding the transaction. It was, therefore, relevant to Plaintiff's claims.

Furthermore, a forensic examination of the hard drive—now impossible—would have been necessary to verify whether it was truly replaced in August 2013, as Mr. Eltouby claims, and whether any recordings had been deleted.

Similarly, Plaintiffs claim that Mrs. Smith was present when Mr. Estrada made misrepresentations about the financing terms they were agreeing to, which she later repeated. (Tuhin Depo, 26:6, 27:25, 53:16, 55:3, 101:1-18; *Tuhin*, Dkt. No. 1, ¶ 36; Lindermayer Aff., Ex. O, 22:18-19; Banon Depo, 78:13-24.) Mrs. Smith, however, claims that she was never present for these transactions, entering the room for, at most, one or two minutes to get something. (Smith Depo, 170:16-171:8.) Recordings showing whether Mrs. Smith was present in the room for an extended time speaks both to her knowledge of the misrepresentations, her role in the business, and her credibility. Accordingly, the recordings are relevant to Plaintiff's claims.

IV. The Appropriate Sanction is Entry of Default Judgment or, in the Alternative, an Adverse Inference Instruction

Courts have a range of spoliation sanctions available. Terminating sanctions are justified in the "most egregious cases," such as where a party "has engaged in perjury, tampering with evidence, or intentionally destroying evidence by . . . wiping out computer hard drives." *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec.*, 685 F. Supp. 2d 456, 469-70 (S.D.N.Y. 2010); s*ee Horn*, 2015 WL 1529824, at *14; *SD Prot., Inc. v. Del Rio*, No. 06-CV-5571 RRM RML, 2008 WL 5102249, at *6 (E.D.N.Y. Nov. 21, 2008) (dismissing case as sanction for disposing of hard drive after receipt of demand letter). The Second Circuit has recognized that "in this day of burgeoning, costly and protracted litigation courts should not shirk from imposing harsh sanctions where . . . they are clearly warranted." *Jones v. Niagara Frontier Transp. Auth.*, 836 F. Supp. 2d 731, 735 (2d Cir. 1987)

Here, Defendants abandoned a critical hard drive either intentionally or in a grossly negligent manner. A terminating sanction is warranted.

That said, lesser sanctions are also available. If the evidence is relevant to a party's claim, its spoliation "can support an inference that the evidence would have been unfavorable to the party responsible for its destruction." *Zubulake V*, 229 F.R.D. at 430; *SJS*, 2013 WL 5596010, at *5 (ordering an adverse inference and monetary sanction without any showing of bad faith or extrinsic evidence); *Augstein v. Leslie*, No. 11 CIV. 7512 HB, 2012 WL 4928914, at *6 (S.D.N.Y. Oct. 17, 2012) (imposing an adverse inference based on mere negligence alone). Moreover, courts may order the spoliating party to pay the moving party's attorney's fees associated with the spoliation issue. *Sovulj*, 2005 WL 2290495, at *6.

Mr. Eltouby owned the dealerships and hired his daughter, Mrs. Smith, to manage NYMG. She worked there full time, oversaw its employees (except for Mr. Estrada), and was unsupervised. (Smith Depo, 65:20-22, 26:13-18; Estrada Depo, 95:8-13.) By summer 2013, they knew about the flood of customer complaints and reasonably could have foreseen litigation. They also knew that key evidence of the fraud, and their role in it, was stored on a hard drive, as both of them regularly monitored those recordings. Yet neither of them took a single step to preserve that evidence, despite direct requests to do so. For these reasons, at a minimum, the Court should instruct the jury to infer from the absence of these recordings that they contained evidence supporting Plaintiffs' claims, and impose monetary sanctions.

CONCLUSION

For these reasons, the Court should, at a minimum, impose a mandatory adverse inference and monetary sanctions.